SUPREME COURT, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-474

UNITED STATES OF AMERICA
ex rel. FRANCIS C. SMITH
Petitioner

V.

CARL ROBINSON, Warden
Connecticut State Prison
Somers, Connecticut

JOHN R. MANSON, Commissioner
Connecticut Department
of Corrections
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

FRANCIS C. SMITH
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Pro se

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The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on December 3, 1973, and (2) granting the petition. As grounds for this motion, petitioner states the following:

Evidence used falsely to convict is an inde-

pendent violation of a constitutional right. Napue V. Illinois, 360 U.S. 264. This is a separate and distinct claim from a claim that the indictment did not charge a felony-class killing. There is a different factual and legal basis to both. An admission made therefore in reply to a claim that the indictment did not charge a felony-class killing, which admission was that there was no unlawful act involved in the crime the conviction for which was being challenged and had been obtained on a charge to the trial jury that they could convict for an alleged killing in an unlawful act as the state prosecutors stood by silently and said nothing and let the petitioner be wrongfully convicted and sentenced to death for an alleged killing in an unlawful act which they now admit never happened, laid the basis and foundation for a wholly different claim of a denial of a constitutional right, one based on the knowing use of evidence to convict falsely for an act that never happened. (See Appx, p. 2, the charge. See Appx., p. 4, the McGowan statement). The petitioner herein made that claim based on the 1964 admission of the state attorney. Sanders V. United States, 373 U.S. 1 at 15 clearly was not intended by this Court to apply on these circumstances.

The United States District Court denied and dismissed the present petition for a writ of habeas

corpus filed in that Court and held that each allegation of a denial of a constitutional right during the petitioner's trial was judicially considered and rejected on prior occasions, except one. See District Court Opinion, p. 25, Appx. Both the factual and the legal basis for this statement fail to appear of record. They do not appear of record from the pleadings made by the attorney for the Respondents, the State Attorney for Fairfield County, Connecticut. See the Return, p. 15, Appx. See Amended Return, R. Doc. No. 35. The record does show however that both the trial judge charged the jury (Charge, p. 2, Appx.) that they could convict for an unlawful act, and that the state prosecutors knew that there was no unlawful act involved in the crime charged (Appx., p. 4). The petitioner's conviction was upheld as a killing in a theft. State V. Smith, 138 Conn. 196, 201 (Appx. p. 7, 8-15). There is no possible doubt here that the state prosecutors knowingly allowed evidence to be used falsely to convict, and that under Napue V. Illinois, 360 U.S. 264, the conviction is unconstitutional. There is no possible doubt that the petitioner had federal jurisdiction on a claim predicated upon the U.S. District Court records, the McGowan admission, as in page 4 of Appx. The admission that no unlawful act was involved in the crime charged. The only question remaining then is whether there was legal justification for the

ruling in the District Court that the present claims were settled previously. If there is in fact no validity to this, then a very serious miscarriage of justice has occurred, and is being aggravated and made worse by not being corrected when it has appeared and is apparent.

In the U.S. District Court the petitioner filed his original, and then later his Amended Petition for a Writ of Habeas Corpus (Doc. No. 4, R.) The U.S. District Court issued a show Cause Order and the Respondent filed his Return (Appx., p. 15). The petitioner then moved for Summary Judgment under Rule 56 (a) of the Federal Rules of Civil Procedure, with supporting Affidavits (Appx. p. 18, and pgs. 19, 23). The U.S. District Court held no evidentiary hearing on the claims of the petition, and two of the claims were not pressed in the Motion for Summary Judgment by the petitioner. The Court reserved decision, some time after which the Respondent filed an "Amended Return," which was filed out of time and without leave or permission as required by Rule 15 (a) of the Federal Rules of Civil Procedure (p. 6, cert. pet.). The petitioner moved that the "Amended Return" (R., Doc. No. 35) be struck. It was not. In fact no ruling was made by the Court on the Motion to Strike. Neither the Return nor the Amended Return set forth any specific fact in their support and consisted mainly of self-serving declarations and

conclusions. There was nothing therein upon which a judgment could be predicated in the Respondent's favor. There was nothing but a series of indefinable vagaries with no fact specified to show its relationship and manner thereof to the claims made and presented by the petitioner in his petition, and in fact were so vague and uncertain that they were unable to raise a justiciable issue as to the petitioner's claims. The petitioner had made a prima facie case especially on the admissions of the state attorneys on the unlawful act matter, and the petitioner's Affidavits were unrefuted by the state attorneys by any matter. The petitioner was clearly entitled to at least an evidentiary hearing as he clearly was entitled to federal jurisdiction on the admissions in the federal court records by the state attorneys that showed that the conviction had been obtained on a false ground with evidence falsely used for that purpose and which resulted in a death penalty. Instead of conducting an evidentiary hearing the District Court summarily denied and dismissed the petition on nothing more than self-serving and totally vague statements of the Respondent without any proof in their support. The petitioner respectfully submits that such procedure is unsustainable at law and that the District Court could not lawfully make a finding of fact and conclusions of law without an evidentiary hearing and proof made of record in

support of the finding. This is so fundamental to legal and trial procedure that it needs no explaining to this Court. Arbitrary judicial decisions rendered summarily in favor of a party without a hearing and without evidentiary proof where there must be proof that the same legal claim on the same factual basis was previously presented, determined on the merits and adversely decided, and so rendered to cut off well merited relief on a prima facie showing, is matter too serious to be tolerated where Constitutional rights are involved and are rendered meaningless and placed beyond any possible remedy by such procedure. The petitioner respectfully submits therefore that the District Court's ruling and Judgment should not be permitted to stand and that it should be reversed on certiorari as erroneous at law.

The petitioner respectfully suggests and urges that this case be remanded back to the U.S. District Court for Connecticut for an evidentiary hearing for a factual determination as to whether the petitioner's claims have in fact been previously presented and heard on the merits, and decided adversely on the same factual basis as now presented and claimed. The petitioner has attached hereto an affidavit that the District Court has never heard evidence as to any claim presented by the petitioner at any time. The petitioner further suggests respectfully that the case be remanded to be heard

by an impartial U.S. District Judge and preferably the Chief U.S. District Judge for the factual determination to avoid possible hostility, with judgment to be rendered in accordance with the proof made of record. In the alternative the petitioner respectfully moves that this Court take any measure it deems proper to correct the injustice here complained of.

There are additional reasons why the denial of an evidentiary hearing worked injustice. The State Attorneys in the Respondent's "Amended Return", paragraph 4 (R. Doc. No. 35) admitted that the State on the trial had in its possession "two" signed statements of Edith Springer dated July 28, 1949 and August 30, 1949, and in neither did she mention the marker plate numbers SS 404 that she testified to almost a full year later that she had seen on a Cadillac before the time of July 28, 1949, which witness and testimony was used by the State to make it appear that the petitioner had driven the Cadillac involved in the case. On cross-examination Springer was questioned about her prior knowledge of both marker plate numbers and the State on re-direct examination deliberately made it appear falesly and knowingly that Springer had known those plate numbers both and so had Springer testify, and therefore knowingly used perjured testimony now shown by this admission, and also knowingly suppressed vital and crucial evidence

both as to the Springer witness's credibilty and that would have proved that she had committed perjury on the trial. The marker plates SL 513 to which Springer also testified were never produced in evidence and their only relevance to the Cadillac in the case was based on Springer's testimony on the Marker numbers SS 404, those registered to the Cadillac involved in the case at the Hollywood Cafe. The state's whole "circumstantial" case was based on the Springer testimony, and therefore perjured evidence knowingly used as such.

The admissions of the State Attorneys on the Springer testimony were made in reply to this petitioner's Statement of Facts in his Original and Amended Petition for a Writ of Habeas Corpus, and paragraphs 9-12 therein (R. Doc. No. 4). Those admissions were sneaked in with the "Amended Return" of the Respondent, after Summary Judgment had been moved for on other claims and after the District Court had reserved decision. Thus while of record the State Attorneys admitted Claims three and four of the Petitioner's petition for a writ of habeas corpus, the District Court denied and dismissed the petition and rendered judgment in favor of the Respondent, cutting the petitioner off from relief on his claims of knowing use of perjured evidence and suppression of evidence. The District Court summarily cut the petitioner off from a hearing or any chance of a hearing on these issues also.

The State Attorneys admitted the petitioner's pleadings. These were verified pleadings supported by AFFIDAVITS (Appx. p. 19, 23). However, because of an arbitrary ruling by the District Court in favor of the Respondents by which the petitioner was cut off from a hearing, the State Attorneys are now in the ironical position of being able to claim that these issues involved here have now been previously decided on the merits, though obviously that is anything but the fact, and in fact quite the contrary. The State Attorneys have had favorable decisions handed to them by the District Court arbitrarily, without evidentiary hearings, and with no proof made of record whatever by the State Attorneys.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, petitioner prays that this Court grant rehearing of the Order of Denial, vacate the order, grant the petition and review the judgment and opinion below.

Respectfully submitted

FRANCIS C. SMITH
Box 100
Somers, Connecticut
06071

December 10, 1973

AFFIDAVIT OF PETITIONER

The petitioner Francis C. Smith hereby deposes on his oath that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2).

The petitioner Francis C. Smith further deposes on his oath that on the previous petition for a writ of habeas corpus in the case of U.S. ex rel. Francis Smith V. Reincke, Warden, 239 F. Supp. 887, before Judge Zampano of the U.S. District Court for Connecticut, the petitioner was given no evidentiary hearing in which he was allowed to produce evidence in support of any claim made therein and that the court-appointed attorney did nothing to substantiate by evidence any claim made by the petitioner and thereby of his own motion dropped many of the petitioner's claims, after which the petitioner tried to proceed without the said attorney but could not and was not permitted by the judges to do so.

The petitioner Francis C. Smith deposes further on his oath that to his best knowledge and belief every single claim made and submitted in his latest petition is based on a different set of facts than that previously presented, although the petitioner would claim as evidence any admissions made in the present petition that heretofore has been concealed by the state attorneys, such as

the admission now made by the state attorneys in the Respondent's Amended Return (R. Doc. No. 35) that the state witness Edith Springer had made two signed statements in neither of which did she mention the marker plate numbers SS 404 which she testified on the trial she had seen on a car driven by the petitioner long before she made and signed the two said statements.

The petitioner further deposes on oath that he does not know how U.S. District Judge Robert C. Zampano can hold that any issue now claimed and presented for a ruling was previously decided when there was no previous evidentiary hearing on any fact so that there is no possible way that His Honor can say that the same factual basis is involved as on any previous petition or that there was a decision on the merits on that factual basis.

State of Connecticut
County of Tolland

Francis C. Smith
Somers, Connecticut

On this 7TH day of December, 1973, personally Appeared before me FRANCIS C. SMITH the petitioner in this case, who, being first duly sworn on his oath, deposes to the truth of the foregoing affidavit.

Notary Public
My Commission Expires Mar. 31, 1975

STATE OF CONNECTICUT

COUNTY OF FAIRFIELD

My name is John H. Smith and I reside in the Town of Norwalk, Fairfield County, Connecticut, at 5 Hill Street. I am over eighteen years of age and I am a citizen of the United States of America and not a party to the within entitled action.

On the day of December, 1973, I served three (3) true copies of the within Petition for Rehearing, on the Attorney for the Respondents, Assistant State Attorney Richard F. Jacobson, by enclosing said copies in a sealed envelope with postage first-class thereon fully prepaid and placing the same in the United States mail at Bridgeport, Connecticut, addressed as follows:

Asst. State Attorney
Richard F. Jacobson
172 Golden Hill Street
Bridgeport, Connecticut
06604

I, John H. Smith, having been duly sworn, attest to the truth of the foregoing on my oath and under penalty of perjury, before , Notary Public, on this day of December , 1973, at Connecticut.

John H. Smith

To the truth of the foregoing, I , Notary Public, on this day of December, 1973, notarise and set with my seal of office.

Notary Public

Seal

APPENDIX

PARAGRAPHS 9-12 OF ORIGINAL AND AMENDED PETITION FOR A WRIT OF HABEAS CORPUS

9. As part of its circumstantial case, the State produced one Edith Springer as its witness and she testified to having seen the petitioner driving on one occasion a gray Cadillac bearing marker plate numbers SS-404, those registered to the aforesaid gray Cadillac, and then later a gray Cadillac bearing marker plate numbers SL-513. The exact dates of these claimed observances were not given but they antedated the date of the crime charged by as much as a month and a half. The State claimed that the co-defendant George F. Lowden had been to the said Hollywood Cafe in this said Cadillac automobile on the night the New York State Police searched and impounded it.

10. On cross-examination of the state's witness Edith Springer she admitted not having known one set of the marker plate numbers SS-404 and SL-513 before the Grand Jury. On re-direct examination by the state's attorney, conducted in a highly leading and coaching manner, the state's attorney deliberately made appear to the jury that the witness Edith Springer had indeed known all along both marker plate numbers SS-404 and SL-513. The marker plate numbers SS-404 were of paramount importance and vital to the State's case since they were those registered to the said gray Cadillac automobile involved and impounded outside the said Hollywood Cafe in Brewster, New York.

11. Subsequently, after the petitioner's conviction and sentence of death, the said state's witness Edith Springer sent a letter to Superior Court Judge Quinlan, confessing and admitting perjury against the petitioner in his trial. A petition for a new trial was made, and heard by Judge Murphy of the Connecticut Superior Court. At that hearing the state's attorney submitted to Judge Murphy for his examination "two" signed statements

by Edith Springer, one dated August 1949, and the second dated about a month later. Judge Murphy in his Finding held that in neither of these "two" signed statements had state 's witness shown the slightest knowledge of the vital marker plate number SS-404. Edith Springer gave her trial testimony on the basis of these signed statements, and in fact the second one was taken by Lt. Hanesovsky, none other than the chief investigator for the state's attorneys, their own agent. Nevertheless on the petitioner's trial these "two" signed statements were supressed by the state's attorneys while they deliberately lead the jury to believe that indeed Edith Springer had known all the time the vital marker plate numbers SS-404.

12. The state also offered the owner of the said gray Cadillac as a witness, one Freid. Freid testified that his car had been stolen "sometime" in June, with no date of the alleged theft given. The petitioner had been driving a gray Cadillac "Fleetwood" from the later part of May to July 4, 1949 to a small summer resort operated by William Peatt at Lake Mamanasco in Ridgefield, Connecticut. Peatt testified that he looked over and discussed with the petitioner the gray Cadillac that the petitioner was driving and which at the time was but a few feet away and which the petitioner pointed out to him as a "Fleetwood" Cadillac while they were discussing this make of Cadillac and its various virtues. The Freid Cadillac was not a "Fleetwood" cadillac automobile.

(R. Doc. No. 4)

AMENDED RETURN TO WRIT
OF HABEAS CORPUS
U.S. DISTRICT COURT

And now comes Carl Robinson, Warden of the Connecticut Correctional Institution at Somers, respondent in the above entitled cause of action and amends his return as follows:

3 and 4 As to page 13, Allegation 1:

The state's case was predicated on the proof of murder in the first degree in that the petitioner committed willful, deliberate andpremeditated murder. This issue was decided in State V. Smith, 138 Conn. 196, 201-202, and Uninited States V. Reincke, 239 F. Supp. 887, 891-892.

As to page 13, Allegation 2:

At the trial the state apparently submitted as evidence articles found in the gray Cadillac solely to establish the presence of the petitioner at the scene of the crime, i.e. the Indian Harbor Yacht Club in Greenwich. To substantiate the conviction for willful, deliberate and premeditated murder the state did not have to prove that these sundry articles were obtained by commission of an unlawful act. This issue was likewise decided in State V. Smith, 138 Conn. 196, 201-202, and United States V. Reincke, 239 F. Supp. 887, 891-892.

As to page 13, Allegation 3:

Once again this claim seeks to raise the allegation that the State suborned perjury in the testimony of Edith Springer. This isuue was fully discussed in State V. Smith, 139 Conn. 249; United States V. Reincke, 239 F. Supp. 887, 896-897; and United States V. Reincke, 354 F. 2d 418, 421.

As to page 13, Allegation 4:

This concerns the claim that the State suppressed or withheld evidence at the trial of the petitioner which would have been favorable to the defense. This assertion arises from the two pre-trial statements given by Edith Springer. One was dated July 28, 1949 and the second one August 30, 1949. These statements contain a reference only to license plate SL513. At the trial Edith Springer

stated that in addition she had seen the gray Cadillac when it also bore license plate number SS404. This issue was thoroughly reviewed in Smith V. State, 139 Conn. 249; United States V. Reincke, 239 F. Supp. 887, 896-897; and United States V. Reincke, 354 F. 2d 418, 421.

As to page 14, Allegation 5:

This challenges the drafting of the Indictment. This claim was reviewed and rejected in United States V. Reincke, 239 F. Supp. 887, 891-892.

As to page 14, Allegation 6:

This claim purports to raise the same issue asserted in Allegation 1 and 2 on page 13. Apparently the petitioner is under the misapprehension that he was charged with felony murder, not willful, deliberate and premeditated murder. Since the petitioner was not charged with felony murder there was no need whatsoever for the State to prove the commission of a felony.

As to page 14, Allegation 7:

The allegation again seems to assume that the petitioner was charged with felony murder. Insofar as it attacks the charge on premeditated murder this issue was decided in State V. Smith, 138 Conn. 196, 201-202. The form of the indictment was upheld in United States V. Reincke, 239 F. Supp. 887, 891-892.

As to page 14, Allegation 8:

The assertion that Section 8350 of the 1949 Connecticut General Statutes is constitutionally void due to vagueness was never raised before the State Courts or the federal Courts. Therefore there still exists a state remedy which has not been exhausted by the petitioner.

As to page 14, Allegation 9:

The additional sentence which the petitioner refers to was imposed in the Superior Court in Hartford on July 28, 1967. After a plea of guilty to the charge of Escape from State Prison the petitioner was sentenced to not less than three years nor more than seven years in State's prison to run consecutively with his life sentence.

Respectfully submitted

Carl Robinson, Warden
Connecticut State Prison
Respondent

By:
Richard F. Jacobson
Richard F. Jacobson
His Attorney

(Copy to Petitioner)

Richard F. Jacobson